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**UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA**

SILVIA GARCIA, individually and on
behalf of all others similarly situated,

Plaintiff,

v.

FOOTWEAR UNLIMITED, INC., a
Delaware corporation d/b/a
WWW.THEFRYECOMPANY.COM,

Defendants.

Case No. 2:24-cv-09959-JFW-E
Assigned to Honorable John F. Walter

**PLAINTIFF'S NOTICE OF
VOLUNTARY DISMISSAL
PURSUANT TO FEDERAL RULE OF
CIVIL PROCEDURE 41(a)(1)(A)(i)**

Complaint Filed: October 7, 2024
Removed: November 18, 2024

1 TO THE COURT, CLERK AND ALL PARTIES OF RECORD, please take notice
2 that Plaintiff Silvia Garcia (“Plaintiff”) respectfully requests dismissal of the instant
3 action pursuant to Rule 41(a)(1)(A)(i) of the Federal Rules of Civil Procedure *with*
4 *prejudice* as to the Plaintiff’s individual claims, and *without prejudice* as to the putative
5 class. There has been no responsive pleading or motion filed, no class has been certified,
6 and there is no settlement or concession of class interests.

7 Pursuant to Rule 23(e), “the district court should inquire into possible prejudice
8 from (1) class members’ possible reliance on the filing of the action if they are likely to
9 know of it either because of publicity or other circumstances, (2) lack of adequate time
10 for class members to file other actions, because of a rapidly approaching statute of
11 limitations, (3) any settlement or concession of class interests made by the class
12 representative or counsel in order to further their own interests.” *Diaz v. Trust Territory*
13 *of the Pacific Islands*, 876 F.2d 1401, 1408 (9th Cir. 1989).

14 Plaintiff contends the *Diaz* factors do not apply to the facts of this case, but even
15 if they did, dismissal is nonetheless proper. In 1989, the Ninth Circuit held in *Diaz* that
16 Rule 23(e) applies prior to class certification. 876 F.2d at 1408. At that time, Rule 23
17 provided that “[a] class action shall not be dismissed or compromised without the
18 approval of the court” Fed. R. Civ. P. 23(e) (as amended Mar. 2, 1987, eff. Aug. 1,
19 1987). Under *Diaz*, the district court evaluating dismissal is to “inquire into possible
20 prejudice from (1) class members’ possible reliance on the filing of the action if they are
21 likely to know of it either because of publicity or other circumstances, (2) lack of
22 adequate time for class members to file other actions, because of a rapidly approaching
23 statute of limitations, (3) any settlement or concession of class interests made by the class
24 representative or counsel in order to further their own interests.” 876 F.2d at 1408
25 (citations omitted).

26 Notably, *Diaz* was decided prior to amendments to Rule 23(e), which clarified that
27 Rule 23(e) applies to *certified* classes or *settlement* classes. Specifically, Rule 23(e) now
28 provides that “[t]he claims, issues, or defenses of a *certified class*—or a *class proposed*

1 *to be certified for purposes of settlement*” may be settled or voluntarily dismissed “only
2 with the court’s approval.” Fed. R. Civ. P. 23(e) (emphasis added); *see also Lee v. CVS*
3 *Pharmacy, Inc.*, No. 3:20-cv-01923-BEN-DEB, 2021 WL 308283, at *2 (S.D. Cal. Jan.
4 28, 2021) (acknowledging that “in 2003, the Congress revised Rule 23 to make clear that
5 court approval is only required in a putative class action where the plaintiff seeks to
6 approve a settlement of both individual and class claims”); 7B Charles Alan Wright &
7 Arthur R. Miller, Fed. Prac. & Proc., *Settlement, Voluntary Dismissal, or Compromise of*
8 *Class Actions* § 1797 (3d ed. 2021) (“settlements or voluntary dismissals that occur
9 before class certification are outside the scope of subdivision (e)”). Accordingly, because
10 no class has been certified and there is no settlement of any kind in this action, Rule 23(e)
11 does not apply. *See* Fed. R. Civ. P. 23(e).

12 Nevertheless, even if the Court were to apply the *Diaz* factors to these
13 circumstances, dismissal would be proper. *First*, it is unlikely that any putative class
14 members have relied on the action to protect their interests given that the case is in its
15 infancy and there are no circumstances suggesting reliance on Plaintiff’s claims. This
16 action has not been publicized in any way and as such, the putative class members are
17 highly unlikely to have knowledge of it, or to have relied upon it in any way. Similarly,
18 Plaintiff’s counsel is unaware of any other circumstances that may have led to the
19 putative class’s knowledge of, or reliance upon, this action. *Second*, just over one month
20 has passed since the filing of the Complaint. As such, the rights of the putative class are
21 preserved by the solely individual dismissal of Plaintiff’s claims with prejudice. *Third*,
22 as discussed above, there is no settlement or concession of putative class interests given
23 that there has been no settlement or compromise of any kind related to any potential class
24 claims asserted in the Complaint. Indeed, the resolution reached between the Parties does
25 not address, affect, or change the putative class’s rights or claims in any manner. Even
26 under *Diaz*, dismissal is proper here.

27 The parties have diligently followed the rules to obtain a voluntary dismissal prior
28 to any substantive response to the Complaint. *Diaz* should not stand as a barrier to

1 dismissal, given the subsequent amendments to Rule 23(e) and the facts of this case in
2 which there is no settlement or compromise of any class claims, no collusion, and no
3 potential prejudice to any putative class member. Moreover, the dismissal as to any
4 putative class members would be *without prejudice*.

5 For all the foregoing reasons, the Plaintiff respectfully requests that the Court enter
6 a dismissal of this action *with prejudice* as to the named Plaintiff and *without prejudice*
7 as to the putative class.

8
9 Dated: November 27, 2024

Respectfully submitted,

PACIFIC TRIAL ATTORNEYS

By: /s/ Scott J. Ferrell

Scott J. Ferrell

Attorney for Plaintiff

CERTIFICATE OF SERVICE

I hereby certify that on November 27, 2024, I electronically filed the foregoing **PLAINTIFF'S NOTICE OF VOLUNTARY DISMISSAL PURSUANT TO FEDERAL RULE OF CIVIL PROCEDURE 41(a)(1)(A)(i)** with the Clerk of the Court using the CM/ECF system which will send notification of such filing via electronic mail to all counsel of record.

/s/ Scott J. Ferrell Esq.

Scott J. Ferrell, Esq.